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Is Age Discrimination a Less Serious Form of Discrimination?

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Abstract

The UK courts and the CJEU have often treated age discrimination as a less serious form of discrimination. This is reflected in the courts' reluctance to offer rigorous scrutiny when evaluating whether age-differential treatment is objectively justified under anti-discrimination law. Further, a number of judges have asserted that age discrimination must be understood as different to other forms of discrimination, such as race or sex discrimination. This article argues that age discrimination is not fundamentally different or prima facie less serious than other forms of discrimination. Age discrimination can undermine the same principles that paradigm forms of discrimination also undermine, including: creating inequality of opportunity by disadvantaging people because of a trait that is outside a person's control; undermining social equality by creating a hierarchy of social status between different groups; violating autonomy by diminishing people's capacity to have control over their lives; and communicating disrespect by conveying that particular groups have a diminished moral or social worth. It follows, contrary to the approach of much of the case law, that the courts should offer rigorous scrutiny of age-differential treatment to identify these harms and only permit age distinctions that are strictly tailored to enhance equality or other important values.

Introduction

Legal interventions concerning age were once generally limited to setting minimum age limits for activities such as marriage, leaving education, paid employment, consuming alcohol and driving and for establishing rules concerning retirement. However, concerns about the impact of the ageing population on economic growth, welfare costs and inter-generational fairness prompted the European Union ('EU') to pass the Employment Equality Framework Directive 2000/78/EC (the 'Framework Directive') requiring EU member states to implement legislation prohibiting age discrimination.¹ The United Kingdom ('UK') followed with the Employment Equality (Age) Regulations 2006 and later the Equality Act 2010, which prohibits unjustified unequal treatment on the grounds of age and disadvantaging particular age groups in access to employment, training and education; membership of associations and clubs and provision of goods and services.²

Despite this legal intervention, age retains a reputation as a less serious ground of discrimination, and this has impacted on the level of scrutiny the courts have been willing to offer when evaluating whether age-differential treatment is objectively justified and therefore lawful under anti-discrimination law.³ The UK courts and the Court of Justice of the European

* Thanks to Virginia Mantouvalou, Hugh Collins, Joe Atkinson and the attendees of the London Labour Law Discussion Group who provided helpful comments on an earlier draft of this article.

¹ In 1999, the European Commission argued that legislation prohibiting age discrimination was necessary as part of a strategy to address the consequences of an ageing population and to enable and motivate older people to remain in work. See Commission, *Towards a Europe for All Ages - Promoting Prosperity and Intergenerational Solidarity* (Com No 221, 1999).

² Equality Act 2010, s 13, s 19.

³ This reputation is also evident in the academic literature. Posner, R in *Aging and Old Age* (Chicago, The University of Chicago Press 1995) p 204 argued that age discrimination is not a real problem and that the concept only exists in the minds of 'some radical egalitarians' who 'see discrimination everywhere.' See also Issacharoff, S and Harris, E 'Is Age Discrimination Really Age Discrimination: The ADEA's Unnatural Solution' (1997) 72 *New York University Law Review* 780 for the argument that age discrimination should not be prohibited because it does not reach the level of seriousness of race or sex discrimination.

Union ('CJEU') have often offered a low level of scrutiny in evaluating the justifiability of age-differential treatment, including a lack of scrutiny on the legitimacy of the defendant's aims and a lack of engagement with the discriminatory impact of treatment.⁴ Furthermore, a number of judges at the UK and EU level have asserted that age discrimination must be understood as 'different' from other discrimination.

Three major arguments have been used in support of understanding age discrimination as different and less serious, including: that age-differential treatment is often a rational means of promoting social and economic objectives;⁵ that age-differential treatment can be compatible with equality of opportunity to a greater extent than other differential treatment;⁶ and that age-differential treatment is not demeaning in the way other differential treatment is.⁷

This article argues that, contrary to the above arguments, age discrimination should not be considered fundamentally different or *prima facie* less serious than other forms of discrimination. Age-differential treatment can be wrong, I argue, for the same reasons that race and sex-differential treatment can be wrong, namely, it can express animosity, convey demeaning ideas about people and can undermine autonomy and equality of opportunity. It follows that the courts and tribunals should rigorously scrutinise age-differential treatment for these harms.

I aim to demonstrate an approach to age discrimination which requires courts and tribunals to evaluate the extent impugned age-differential treatment undermines the principles

⁴ This lack of scrutiny is revealed in *Palacios de la Villa v Cortefiel Servicios SA* (411/05) [2007] ECR I-8531; *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (341/08) ECR I-00047; *Rosenblatt v Oellerking Gebäudereinigungsgesellschaft mbH* (45/09) ECR I-09391; *Wolf v Stadt Frankfurt am Main* (229/08) ECR I-00001; *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] 3 All ER 130; and *R v SS for Work and Pensions Ex p Carson and Reynolds* [2005] UKHL 37; [2006] 1 AC 173.

⁵ See *Palacios de la Villa v Cortefiel Servicios SA* (411/05) [2007] ECR I-8531, Opinion of AG Mazák, para 62.

⁶ See *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] 3 All ER 130, para 4.

⁷ See *R v SS for Work and Pensions Ex p Carson and Reynolds* [2005] UKHL 37; [2006] 1 AC 173, para 60.

that paradigm forms of discrimination undermine, which I argue includes: equality of opportunity (which requires that people should not be made worse off on grounds that someone cannot be held responsible for), social equality (which holds that it is wrong when conditions produce hierarchies of status), respect (which prohibits expressions of insults or messages that certain people are worthy of lesser concern and respect) and autonomy (which prohibits actions that unfairly diminish a person's opportunities for autonomous agency).

To illustrate this approach, I compare and contrast the theory of age discrimination defended in this article to the approaches in three significant UK age discrimination cases that have accorded age discrimination a lower moral status. I consider *Seldon v Clarkson Wright & Jakes*⁸ – the leading UK age discrimination case concerning retirement ages; *Lockwood v Department of Work and Pensions & Anor*,⁹ which related to lower redundancy pay for younger people; and, finally, *R v SS for Work and Pensions Ex p Carson and Reynolds*,¹⁰ which concerned the lower rate of jobseekers' allowance for people under the age of 25. These cases illustrate a reliance on ageist assumptions and stereotypes in justifying age-differential treatment. I re-work the cases to illustrate a framework that accords weight to the moral seriousness of age discrimination. Further to this, I demonstrate the difference the framework should make to the legal and moral reasoning in the cases. In selecting these cases, I intend to offer a detailed account of the philosophical analysis outlined in this article rather than offering a complete outline of the CJEU, UK and European Convention on Human Rights ('ECHR') jurisprudence.¹¹

⁸ [2012] UKSC 16; [2012] 3 All ER 130.

⁹ [2013] EWCA Civ 1195, [2014] 1 All ER 250.

¹⁰ [2005] UKHL 37, [2005] 4 All ER 545.

¹¹ For a detailed overview of the CJEU jurisprudence on age discrimination, see O'Cinneide, C 'Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age' (2009) 2 *Revue des affaires*

I structure this article as follows: firstly, I explain that the age discrimination laws in the EU and UK require that courts and tribunals consider the moral status of age discrimination as part of the process of identifying unjustified and unlawful age discrimination; secondly, I outline theories of the moral status of age discrimination presented in the case law and academic literature; thirdly, I explain that, contrary to the approaches in the case law and academic literature, age discrimination is not fundamentally different or a *prima facie* less serious ground of discrimination; and, fourthly, I illustrate this argumentation by comparing and contrasting the theory of age discrimination defended in this article to the approaches adopted in the case law.

Age Discrimination Laws Require Moral Reasoning about Age Discrimination

Establishing the moral status of age discrimination is essential to the proper application of age discrimination laws in the EU and UK. This is because age discrimination laws distinguish justified age-differential treatment, which is lawful, from unjustified age-differential treatment, which is not.¹² To make this distinction, courts and tribunals must engage with theoretical questions about when it is unjustified to treat people less favourably on the grounds of age and when it is unjustified to disadvantage particular age groups. For example, Article 6 of the Framework Directive asserts that

européennes 253. There are a limited number of ECHR cases on age discrimination, but the Strasbourg court has held that age-differential treatment engages Article 14 of the ECHR. In *Schwizgebel v Switzerland* App no 25762/07 (ECtHR, 10 June 2010), the Strasbourg Court held that a policy that denied a 47 year old women the option of adoption because of her age was age-differential treatment that engaged Article 14. Also, the House of Lords in *Carson and Reynolds* affirmed that Article 14 of the ECHR prohibits age-differential treatment in the UK unless the treatment is objectively justified.

¹² See Equality Act 2010, s 13(2), s 19; Framework Directive, Article 6; and Article 14 of the ECHR.

Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim ... and if the means of achieving that aim are appropriate and necessary.

The Framework Directive will continue to take effect in the UK even after the UK withdraws from the EU. The European Union (Withdrawal) Act 2018 will transpose the already existing EU law, including the Framework Directive, into UK law.

Consider also section 13(2) of the Equality Act 2010 that provides that age-differential treatment does not constitute unlawful age discrimination in the UK if the treatment is a 'proportionate means of achieving a legitimate aim' and Article 14 of the ECHR, which secures the enjoyment of ECHR rights 'without discrimination' on grounds including age unless the differential treatment is proportionate to a legitimate objective.¹³

Each of these laws that are applicable in the UK require judges to assess the proportionality of impugned treatment, which requires an assessment of whether impugned treatment furthers 'legitimate aims' that are important enough to justify treating people unequally on the grounds of age and an assessment of whether impugned treatment achieves an appropriate balance between the discriminatory impact of the treatment against the values promoted by the treatment.¹⁴ This proportionality assessment requires courts and tribunals to consider the seriousness of the discriminatory harms of age-differential treatment. Further to

¹³ See the *Schwizgebel* case for authority that age-differential treatment engages Article 14.

¹⁴ In *Seldon v Clarkson, Wright and Jakes* [2012] UKSC 16, [2012] ICR 716, the UK Supreme Court held this is the appropriate test for proportionality assessments in age discrimination cases.

making this assessment, courts and tribunals should consider whether age-differential treatment is capable of being as serious as paradigm forms of discrimination. If it is, then courts and tribunals should undertake a high level of scrutiny to identify the wrongs that paradigm forms of discrimination are capable of inflicting.

In the next section, I consider the arguments in the case law and the academic literature for understanding age discrimination as different or *prima facie* less serious than other forms of discrimination. I later argue these accounts are unconvincing.

The Arguments that Age Discrimination is Different

Mazák AG's opinion in the CJEU case *Palacios de la Villa v Cortefiel Servicios SA*¹⁵ argued that age-differential treatment is different to other forms of discrimination because it is 'common in social and employment policies'.¹⁶ He argued that the Framework Directive, which prohibits age-differential treatment, should not apply to the impugned national retirement age because 'it would... be very problematic to have this Sword of Damocles hanging over all national provisions laying down retirement ages, especially as retirement ages are closely linked with areas like social and employment policies where the primary powers remain with the Member States...'.¹⁷ This implies that the CJEU should avoid rigorous scrutiny of the justifiability of age-differential treatment, such as retirement ages.

In *Age Concern*, Mazák AG reiterated his view that age is different because 'age-limits and age-related measures are...widespread in law and in social and employment legislation in

¹⁵ (411/05) [2007] ECR I-8531.

¹⁶ *Ibid*, Opinion of AG Mazák, para 62.

¹⁷ *Ibid*, para 64.

particular.’¹⁸ He asserted that ‘[a]ge is not by its nature a “suspect ground”, at least not so much as for example race or sex’,¹⁹ implying that age-differential treatment is less invidious than other forms of discrimination.

In the UK Supreme Court case *Seldon v Clarkson Wright and Jakes*,²⁰ Lady Hale outlined an equality of opportunity argument for treating age discrimination as ‘different’. In this case, Lady Hale asserted that ‘age is different... not "binary" in nature (man or woman, black or white, gay or straight) but a continuum which changes over time... younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age’.²¹ The nature of age means that people may experience the different advantages and disadvantages associated with different age groups, and this means that age-differential treatment can be compatible with equality of opportunity measured over a complete life. This is the explanation, Lady Hale argued, for anti-discrimination law permitting proportionate direct age-differential treatment but only permitting differential treatment on other grounds in a much narrower range of circumstances.²²

In *R v SS for Work and Pensions Ex p Carson and Reynolds*,²³ Lord Walker held that age classifications are ‘different in kind’ from other more potent classifications, such as race or sex, because classifying people by age is not ‘intrinsically demeaning’ in the way that race or

¹⁸ (388/07) ECR I-01569, Opinion of Mazák AG, para 74.

¹⁹ *Ibid.*

²⁰ [2012] UKSC 16; [2012] 3 All ER 130.

²¹ *Ibid.*, para 4.

²² *Ibid.*

²³ [2005] UKHL 37; [2006] 1 AC 173.

sex classifications are, and therefore a lower level of judicial scrutiny was appropriate when evaluating whether the impugned treatment is objectively justified.²⁴

In the academic literature, Richard Posner has argued that age discrimination is not analogous to invidious forms of discrimination, such as race or sex discrimination, because age can be an efficient proxy for characteristics that are important for employers, including job capability.²⁵ Age-based rules are typically simpler to administer than making assessments of individual employees and thus can bring about cost savings. Age discrimination in employment, Posner argues, represents the demands of competitive pressures for rational employment policies rather than prejudice.

Posner acknowledges that people subject to an age distinction will not always have the characteristic that the age distinction is a proxy for. This is due to variance in people's capabilities. However, age distinctions can still be justified for Posner because age distinctions are less costly than assessing individuals directly. Prohibiting employers from using age distinctions can lead to higher labour costs which are likely to be passed on to younger workers in the form of reduced wages or benefits.

Samuel Issacharoff and Erica Worth Harris have argued that age discrimination is different because age discrimination laws in the United States do not protect any group that is

²⁴ Ibid, para 60. This is similar reasoning to the US Supreme Court in *Massachusetts Board of Retirement v Murgia* (1976) 438 US 285, which held that older people 'have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities' (at 313).

²⁵ Posner, R 'Employment Discrimination: Age Discrimination and Sexual Harassment' (1999) 19.4 *International Review of Law and Economics* 421.

socially reviled, penurious, or cut off from the mainstream of society and/or marked by the badge of social opprobrium.²⁶

In another account, Axel Gosseries has argued that there are two features of age discrimination that make it ‘special’, including its efficiency and that it can reduce inequality.²⁷ In line with Posner’s argument, Gosseries argues that age criteria can be relatively reliable proxies for intellectual and physical development, at least at young and old age. Age proxies can reduce the costs of pursuing valuable social goals by sequencing people’s lives to undertake a course of action at a particular point in the life cycle when individuals and society receive the most benefit from the activity. For example, we can maximise the benefits of education by forcing people to undertake education prior to actually putting it in practice.

Secondly, age criteria can *reduce inequalities* over complete lives because age distinctions can apply to everyone to ensure they can equally experience a particular opportunity e.g. voting from 18 years old. Gosseries has argued that age-differential treatment can reduce inequalities by distributing from an age cohort that has experienced favourable opportunities to another cohort that has been disadvantaged in comparison. For example, consider economic conditions that have resulted in a particular age cohort having a higher unemployment rate than an older cohort experienced at an equivalent age. A mandatory retirement age might aim to redistribute opportunities from older people who have already experienced comparatively favourable employment opportunities to younger people who have had fewer of these opportunities.

²⁶ Issacharoff, S and Harris, E ‘Is Age Discrimination Really Age Discrimination: The ADEA's Unnatural Solution’ (1997) 72 *New York University Law Review* 780.

²⁷ Gosseries, A ‘What Makes Age Discrimination Special? A Philosophical Look at the ECJ Case Law’ (2014) 43.1 *Netherlands Journal of Legal Philosophy* 59.

In the next section, I argue that, contrary to the above arguments, age discrimination can inflict the same types of harms as other discrimination and, in the circumstances where age-differential treatment can be justified, it can be justified for the same reasons that other forms of differential treatment can be justified. In other words, age-differential treatment is not different or special or necessarily less serious.

Age Discrimination can Match the Harms of Paradigm forms of Discrimination

From the cases and academic commentary outlined above, we have three major rationales justifying treating age as a less serious ground of discrimination, including: that age is not a suspect ground because age distinctions are often rational methods of promoting valuable social and economic objectives; that age distinctions can be compatible with equality of opportunity to the extent that other distinctions are not; and that age distinctions are not demeaning in the way that other distinctions are.

To examine whether these arguments are persuasive for treating age discrimination as a less serious form of discrimination, we must examine whether age discrimination can match the wrongs of paradigm forms of discrimination. If this can be demonstrated, then this is an important reason to doubt the arguments that age discrimination is necessarily a less serious form of discrimination.

To investigate this, we need to start by considering principles that explain why and when discrimination wrongs people and then determine whether these principles also explain the wrongs of age discrimination. Further to this, I consider four major principles, including:

equality of opportunity; social equality; autonomy; and respect. I also consider whether age is different because it can be ‘useful’ for achieving particular social and economic goals.

Equality of opportunity

Shlomi Segal has argued that ‘discrimination is bad as such...because and only because it undermines equality of opportunity.’²⁸ All forms of wrongful discrimination, he has argued, are wrong because they cause inequality of opportunity. Equality of opportunity holds that inequalities are acceptable if they result from personal choices and unacceptable when they result from factors outside our control.²⁹

Discrimination can cause unjust inequality of opportunity because discrimination disadvantages people, whether in services, employment or associations, on the grounds of a trait that a person cannot control and/or should not be held responsible for, including traits such as race, sex, gender and sexual orientation. Many of the protected characteristics in the Equality Act 2010 such as race, gender and nationality, are traits that people are powerless to change. Since every person is entitled to equal concern and respect, it is wrong to permit better conditions to particular people on an arbitrary basis, including on traits such as race, sex, gender and sexual orientation.

But to what extent does equality of opportunity explain the wrong of age discrimination? As outlined above, Lady Hale has argued in *Seldon* that age discrimination is

²⁸ Segal, S ‘What’s so Bad about Discrimination?’ (2012) 24 *Utilitas* 82 at 82.

²⁹ This is the luck egalitarian version of the equality of opportunity principle, which holds that it is wrong for a person to be worse off to the extent that they are *not directly responsible for their condition of being worse off*. The following have defended this principle: Segal, S *Equality and Opportunity* (Oxford: Oxford University Press 2013); Mason, A *Levelling the Playing Field: The Idea of Equality of Opportunity and Its Place in Egalitarian Thought* (Oxford: Oxford University Press 2006).

‘different’ because age distinctions can be compatible with equality of opportunity.³⁰ People experience the benefits and detriments of different age groups over time and therefore stable age distinctions can be experienced by everyone who lives long enough to reach the age of that policy.³¹

However, most age distinctions are not stable and can cause inequality of opportunity when age distinctions are altered or removed. For example, a mandatory retirement age may be altered or removed with the result that some will face the detriment of the policy, but those who reach retirement age after the policy is revoked or changed will not face the detriment that older age groups faced. Further, employees can leave employers with retirement ages and work for an employer without retirement ages. A retirement age may affect one group of workers who have remained with an employer with a retirement age while not affecting other workers who have left the employer to work for an employer that does not have a retirement age. Therefore, age-differential treatment does, in many instances, cause inequality of opportunity on the grounds of a trait that people are powerless to change and can therefore be analogous to paradigm forms of discrimination.

However, as outlined in the previous section, Gosseries has argued for another way age distinctions can enhance equality of opportunity in a way that makes age discrimination ‘special’. He argued that it is possible to design stable age distinctions that ensure opportunities are more equal than they would be otherwise by denying opportunities to older age groups that have experienced favourable opportunities and distributing these opportunities to younger age

³⁰ Cupit, G in ‘Justice, Age, and Veneration’ (1998) 108 *Ethics* 702 noted that ‘the alleged injustice of age discrimination presents a puzzle’ because the ‘[s]tandard argument against discrimination – the argument from equalizing benefits – seems not to apply.’

³¹ This is the *complete-life* version of equality of opportunity. Nagel, N in *Equality and Priority* (Oxford University Press 1991) p 69, for example, argued that ‘the subject of an egalitarian principle is not the distribution of particular rewards to individuals at some time, but the prospective quality of their lives as a whole, from birth to death.’

groups that have experienced less favourable opportunities. In this way, age-differential treatment can work as positive action favouring disadvantaged age groups. However, it is also possible to design race or sex distinctions as positive action to enhance equality of opportunity by distributing opportunities to disadvantaged groups. For example, positive action in favour of disadvantaged racial groups, such as offering work training or initiatives to improve diversity in workforces, can be a means to enhance equality of opportunity. Indeed, the Equality Act 2010 permits positive action measures across the protected characteristics, albeit in rather restricted circumstances.³² This reveals that the principle of equality of opportunity can work in similar ways in explaining age discrimination and paradigm forms of discrimination.

Social equality

Another important account of the wrong of discrimination is social equality, which relates to the ideal that people should be able to participate in society as equals.³³ Domination, oppression and social exclusion undermine people's status as equals and therefore violate social equality. Discrimination can violate social equality by restricting access to power, wealth and political influence to particular social groups which in turn can lead to social exclusion. Race discrimination, for example, has had the effect of restricting access to power, wealth and political influence by erroneously ascribing the biological status of distinctness and otherness to groups of people. Social equality also explains that indirect discrimination can be wrong because structures may perpetuate the social domination of certain groups even if no individual deliberately tried to harm those subject to disadvantages.

³² See Equality Act 2010, s 158 and s 159.

³³ For an account of the social equality explanation of the wrong of discrimination, see Bagenstos, S 'Employment Law and Social Equality' (2013) 112 *Michigan Law Review* 225.

Social equality can also explain the harm of age discrimination. Age discrimination can undermine social equality by reinforcing age-based hierarchies of social status. Mandatory retirement, for example, can lock older people out of work which may lead to social exclusion and marginalisation of older people. Our society links work to social status and therefore removing people from work can have the effect of assigning older people to a lower social status. As Sandra Fredman has argued, '[d]eparture from the labour force frequently gives the impression that individuals are no longer active contributors to society'.³⁴

There are examples of age stereotyping that also undermine the social status of young people. For example, young people are perceived as less reliable, less committed and less motivated in their work.³⁵ Young people can be discriminated against on these grounds which can make it harder for young people to be taken as seriously as older age groups, which can also have the effect of making it harder for young people to find employment and achieve promotion. This means that age discrimination can create hierarchies of status in ways that are analogous to how paradigm forms of discrimination can create hierarchies of status.

Autonomy

Another important principle to consider in determining the wrong of discrimination is that discrimination can undermine autonomy. John Gardner defines autonomy as 'the ideal of a life substantially lived through the successive valuable choices of the person who lives it, where valuable choices are choices from among an adequate range of valuable options'.³⁶ Gardner

³⁴ Fredman, S 'What do we Mean by Age Equality?' (2001) *Paper to the IPPR Seminar on Age as an Equality Issue* 30.

³⁵ See Sargeant, M 'Young Workers and Age Discrimination' (2010) 26 *The International Journal of Comparative Labour Law and Industrial Relations* 467.

³⁶ Gardner, J 'On the Ground of Her Sex(uality)' (1998) 18 *Oxford Journal of Legal Studies* 167 at 170.

has argued that discrimination violates autonomy when the discrimination is related to immutable characteristics and fundamental choices. Discrimination because of immutable traits, such as race and sex, violates autonomy because it results in restricting the choices of the victim of discrimination:

Because these choices are based on our immutable status, our own choices can make no difference to them. And where the discrimination is endemic enough, we are left with too few valuable options to choose among and we are deprived of valuable choice over large swathes of our own lives.³⁷

Gardner has explained that discrimination on the ground of fundamental choices (such as religion) violates autonomy by attaching costs to an individual choosing between available valuable options. In this way, discrimination has the effect of foreclosing some meaningful choices. Discrimination law offers people the opportunity to make their own valuable choices, rather than have their lives dictated to by others.³⁸

Gardner has also argued that indirect discrimination violates autonomy because it exacerbates the low autonomy levels of groups that have been subject to widespread discrimination in the past. The indirect discrimination provisions enhance autonomy by removing disadvantages that attach to people's immutable traits and fundamental choices.

³⁷ Ibid, at 170.

³⁸ Ibid, at 171.

In a similar account to Gardner, Moreau has argued that discrimination is wrong because it attaches costs to people's choices.³⁹ For Moreau, 'people should not be constrained by the social costs of being one race rather than another when they deliberate about such questions as what job to take or where to live.'⁴⁰ On this account, anti-discrimination law protects people's freedom to go about their lives with their choices being insulated from traits that are morally irrelevant, such as race and sex.

Age discrimination also undermines autonomy in similar ways to paradigm forms of discrimination. Age is not a characteristic we can control and therefore age discrimination can reduce people's options without people's choices making a difference. For example, a mandatory retirement age forces older people out of work and therefore undermines older workers' capacity to have control over their working lives. The age stereotyping that underpins and sustains age discrimination can also harm autonomy. Our society stereotypes older people as being in decline, lacking productivity and a burden to society. If older people internalise the message that they are incompetent, then they are likely to lose self-esteem potentially resulting in a lack of confidence to act with conviction when making important life decisions.

Discrimination as disrespect

Another feature of why we object to discrimination is connected to the *disrespect* that the act communicates. For example, we object to racism not just because of autonomy harms or because it undermines equality of opportunity but also because the treatment communicates that the victim has a degraded moral status. There are subtly different accounts of the respect

³⁹ Moreau, S 'What is Discrimination?' (2010) 38 *Philosophy and Public Affairs* 143.

⁴⁰ *Ibid*, at 48.

explanation of discrimination. The first account is that discrimination is wrong when a discriminator is motivated by prejudice.⁴¹ Prejudice occurs when a person acts on the belief that another person deserves less respect than others because of their social-group membership. This includes racist, sexist or ageist treatment.

Another version is the theory that discrimination is wrong when it undermines the victim's self-respect. As Rawls has argued, disrespectful treatment is likely to undermine the self-respect of people subject to the action since how other people treat us affects our self-esteem. And, for Rawls, self-respect is 'perhaps the most important primary good.'⁴²

Deborah Hellman has defended another account that identifies the wrong of discrimination in the 'social meaning' of the discriminator's actions rather than the thought process of the discriminator or the impact discrimination has on individuals or groups.⁴³ Discrimination is wrong, Hellman has argued, because it demeans, and discrimination demeans when the treatment communicates that the victim is less worthy of concern and respect. This can include treatment that conveys a message that a person has a diminished moral worth because a person's life and their interests are less important or valuable than others, for example, treatment that is straightforward prejudice, including racist treatment that demeans by ranking people according to their skin colour and sexist treatment that ranks men above women. However, unjustified demeaning treatment also includes treatment that is not as egregious as straightforward prejudice but nonetheless is insulting, insensitive or can reasonably be interpreted to communicate that particular people have a lower status.

⁴¹ Cavanagh, M in *Against Equality of Opportunity* (Oxford: Clarendon Press 2002) p 166 has identified wrongful discrimination as treating people 'with unwarranted contempt'.

⁴² Rawls, J *A Theory of Justice* (Cambridge: Harvard University Press 2009) p 440.

⁴³ Hellman, D *When is Discrimination Wrong?* (Cambridge: Harvard University Press 2008).

For example, a lecturer who instructs black students to move to one side of the lecture hall and white students to move to the other side of the lecture hall because the lecturer likes the aesthetic it produces rather than being motivated by any form of prejudice. Despite benign motives, we would still view this as offensive conduct because it is insensitive and humiliating to the students regardless of the motives of the lecturer.⁴⁴

Also, demeaning treatment can include relatively accurate generalisations about a group of people when that generalisation reinforces ideas that particular social groups have a lower moral and social worth. For example, if we assume that a pregnant woman taking maternity leave is likely to reduce that person's productivity compared to men over the long term, and an employer uses this as a reason to discriminate on the grounds of pregnancy by claiming that pregnancy is relevant when maximising profits, this is disrespectful discrimination because it reinforces the sexist idea that it is women's responsibility to incur a disproportionate burden of reproduction.

Importantly, however, some accurate generalisations are not necessarily disrespectful. For example, the assumption that women may need separate sports competitions because of physiological differences between men and women. This is unlikely to be considered demeaning because it can be justified as promoting the opportunity for women to compete successfully in sporting events. In this way, the generalisation enhances equality of opportunity and can be justified on this basis.

Demeaning treatment includes treatment that communicates a false judgment that a person has a lower social worth. This includes treatment that communicates that a person has less to contribute to society, whether economically or socially, because of a characteristic they possess. For example, rejecting a woman job applicant on the assumption that women are less

⁴⁴ Ibid, 26.

productive than men or acting on assumptions that certain racial groups are less intelligent and capable. This treatment can also demean because the stereotypes that underpin the treatment can be used to legitimise existing social arrangements which in turn work by keeping certain groups 'in their place'. For example, people may correctly perceive certain ethnic groups as occupying lower social strata. They may conclude from this that the explanation for these groups occupying the lower social strata is that these groups are unintelligent, lazy etc. And from these stereotypes they conclude that it is justified to discriminate against these groups.

Age-differential treatment can demean in ways that are analogous to how race or sex-differential treatment demean. Age discrimination can reflect assumptions that particular age groups have diminished moral or social worth. For example, age discrimination can convey that older people are useless, senile and a burden to society. Older people are also stereotyped as greedy and selfish and, as a result, depriving needier groups of wealth and opportunities.⁴⁵ Age discrimination can also stereotype the young as dangerous, untrustworthy and unreliable.

We can find examples of disrespectful age discrimination in cases. In ET in *Dove v Brown & Newirth Ltd*⁴⁶, the ET held that nicknaming someone 'gramps' amounted to less favourable treatment because these comments were disrespectful and hurtful. The ET in *Nolan v CD Bramall Dealership Ltd t/a Evans Halshaw Motorhouse Worksop*⁴⁷ held that age-related 'banter', including introducing an employee as the '104 year old Service Team Leader' and changing that employee's number plate from 'OAB' and to 'OAP', was less favourable treatment on the grounds of age. In *James v Gina Shoes Ltd*,⁴⁸ the EAT held that it was less

⁴⁵ For an example of this stereotyping, see David Willetts, *The Pinch: How the Baby Boomers Took Their Children's Future-and Why They Should Give it Back* (London: Atlantic Books 2011).

⁴⁶ [2016] UKET/3301905/2015

⁴⁷ [2012] UKET/2601000/12.

⁴⁸ [2011] UKEAT/0384/11/DM.

favourable treatment to make remarks reflecting age stereotypes, including the remark directed at the complainant 'you can't teach an old dog new tricks'. Each of these examples includes treatment that conveys negative and insulting assumptions about age or treatment that is likely to humiliate or undermine the self-respect of the victim. This ageist treatment is offensive for the same reasons we find racist or sexist treatment offensive.

The usefulness of age distinctions in social and economic policy

As outlined above, Mazák AG has asserted that age should, nonetheless, be considered as a non-suspect ground because many age distinctions are useful for achieving social and economic objectives rather than being demeaning. Similarly, Posner and Gosseries have argued that age distinctions are simple to administer and can be relatively reliable proxies which can reduce the costs of pursuing important social goals and that this makes age discrimination 'different' from other forms of discrimination.

It is certainly true that age distinctions can be useful in social and economic policy. This may explain why the Equality Act 2010 does not protect people under 18 years of age in relation to the field of goods, facilities and services. There are many examples of policies in these contexts where differential treatment directed at children is necessary to promote social and economic policies, including policies such as compulsory education for children, alcohol restrictions by age, smoking restrictions etc. We can justify these policies because age is a strong proxy for many characteristics at young age, including intellectual development, maturity and physiological developments, which can make it efficient to use age proxies to promote valuable social ends, including educational development and health. Furthermore, if these policies are stable over time, they can be consistent with equality of opportunity as people can experience the age distinction for about an equal number of years.

This argument does not, however, demonstrate that age is necessarily different and a *prima facie* less serious ground of discrimination. While it is true that age distinctions in social and economic policy can aim to grant people equal opportunities to access important social goods, for example, compulsory education under the age of 16 is a policy that ensures that everyone has the opportunity to have an education at the time of life when it is most likely to have a beneficial effect to the individual and society, importantly, as I have explained above, race or sex distinctions can also be justified on the grounds of advancing equality when the policy assists disadvantaged groups. Therefore, many age distinctions can be justified for the same reasons that many race or sex distinctions are justified, namely to advance equality.

Furthermore, protected characteristics under anti-discrimination law, such as sex, are used relatively widely in social and economic policy yet still considered serious grounds of discrimination. The same can be true for age as a protected characteristic. For example, sex distinctions in sports reflect differences in strength and stamina between men and women, and sex-segregated sports has the positive outcome that women can thrive in sports to the extent that may not be possible without this policy.⁴⁹ Single-sex establishments, such as prisons and domestic violence shelters, aim to ensure women are not put under psychological distress by the presence of men in vulnerable situations.⁵⁰ Further, special services for maternity and pregnancy directed at women promote positive social ends.⁵¹

We consider these policies as useful rather than demeaning. Nonetheless, we recognise that sex distinctions can cause serious harms even though there are contexts where sex

⁴⁹ Equality Act 2010, s 195 permits sex-segregation in sports events provided ‘strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.’

⁵⁰ Equality Act 2010, s 27 provides for provision of single sex provision of services if the service would be provided more effectively this way or if there if only persons from a particular sex that need that service.

⁵¹ *Ibid.*

distinctions are useful in social and economic policy. Similarly, age distinctions can be useful in social and economic policy but age-differential treatment can, in other contexts, cause serious harms, including, as I argue in this article, perpetuating oppressive relations, stereotyping people, expressing animosity and substantially reducing the autonomy of people. This means that there ought to be a high level of judicial scrutiny for these sorts of harms while also recognising that age-differential treatment can be useful and justified in some contexts.

Revisiting UK Age Discrimination Case Law

I have established that age discrimination can inflict harms that are equivalent to the harms of paradigm forms of discrimination, including violating equality of opportunity, social equality, autonomy and respect. It is essential, then, that the courts, when evaluating whether impugned treatment is unjustified and unlawful, should consider the extent to which the impugned treatment violates these principles. To illustrate this theory of age discrimination, I consider *Seldon*, *Lockwood* and *Carson and Reynolds*, and contrast the theory of age discrimination defended in this article to the approaches in these cases.

Seldon v Clarkson Wright and Jakes

Seldon is the leading UK case on mandatory retirement ages. The claimant, a partner in a firm of solicitors, was compulsorily retired from his partnership at age 65 in accordance with the retirement age contained in the partnership deed. The law firm argued that the retirement age was lawful because it was a proportionate means of achieving a legitimate aim. They argued that the retirement age supported the following legitimate aims: (1) ensuring the law firm's associates have opportunities to reach partnership; (2) facilitating planning of the partnership

by opening vacancies; and (3) limiting the need to undertake performance management reviews for older workers, thereby creating a congenial and supportive culture in the firm.

The Supreme Court offered guidance on the aims that are capable of justifying age-differential treatment. The Court held that only social-policy aims are capable of justifying measures that engage the direct age discrimination provisions. Social-policy aims include a wide variety of aims related to employment policy, the labour market or vocational training and can be divided into two categories. The first category of legitimate aims are aims that promote 'inter-generational fairness', and this includes policies such as 'facilitating access to employment for young people, sharing work fairly between the generations and enabling older people to remain in the workforce'.

The second category of legitimate aims relates to protecting 'dignity', and this includes aims of avoiding placing older workers in incapacity or underperformance processes. Increased monitoring and performance evaluation, the Court held, may lead to dismissals prior to the normal age of retirement, undermining the dignity of older workers.

The Supreme Court remitted the issue of whether the impugned retirement age was proportionate to the ET where it was held that the retirement age was proportionate. The claimant appealed to the EAT where it was also held that the retirement age was proportionate.⁵² A key factor in this finding was that the claimant had consented with equal bargaining power to have the retirement age as part of the partnership deed of the defendant law firm.

⁵² EAT [2014] UKEAT/0434/13/RN.

Commentary

Contrary to the findings in *Seldon*, dismissing older workers in order to avoid capability assessments to preserve the 'dignity' of older workers should not be capable of justifying retirement ages. The 'dignity' aim violates the respect principle because it implies the insulting message that older workers should be removed from employment because they may be incapable. As Alysia Blackham has argued, using dignity to justify unequal treatment in this way can 'embed age stereotypes in equality law' concerning the competence of older workers.⁵³ There is no compelling empirical evidence to support the general claim that job performance declines with age.⁵⁴ Making assumptions about older workers capabilities without assessing their actual capabilities as individuals implies that older workers have a diminished social worth because of their age. Furthermore, while capability assessments may cause embarrassment, they are less likely to be demeaning than dismissing workers on the assumption that older workers are bad workers.

The other group of aims identified by the Supreme Court, namely 'inter-generational fairness' aims, are, in contrast, legitimate. Inter-generational fairness aims can aim to create job and promotion opportunities for younger age groups that can promote equality of opportunity by requiring access to income and work to be withheld from those who have held employment for a considerable time (older workers) and granted to age groups who experience relatively high unemployment (young people). While the retirement age in *Seldon* is unlikely to create complete equality of opportunity for each worker in the law firm because some workers might leave before facing the detriment of the retirement age, the law firm's retirement age can work

⁵³ Blackham, A 'Interrogating the 'Dignity' Argument for Mandatory Retirement: An Undignified Development? (2018) *Industrial Law Journal* at 21. Advance online publication. <https://doi.org/10.1093/indlaw/dwy013>.

⁵⁴ See McEvoy G and Cascio W 'Cumulative Evidence of the Relationship between Employee Age and Job Performance' (1989) 74.1 *Journal of Applied Psychology* 11.

to create a wider equality of opportunity by granting opportunities to groups who may not have promotion opportunities if the older workers did not retire.

Inter-generational fairness can also promote social equality by distributing opportunities to younger people who are disadvantaged because of lack of experience. Youth unemployment rates are much higher than unemployment in other age groups.⁵⁵ Social equality holds that it is legitimate to take measures to encourage young people into employment to ensure they have a chance to participate productively in society as equals with other age groups.

Inter-generational fairness, therefore, is positive action in favour of disadvantaged young people, which is a means to achieving equality. This aim is legitimate provided it does not have the effect of stigmatising older people or marking them as inferior.

However, it is important to consider whether the retirement age actually furthers the legitimate aim of inter-generational fairness. It can be argued that inter-generational fairness relies upon the lump-of-labour fallacy, which holds that removing some people from work creates more opportunities for others. This is a fallacy because the economy does not hold a fixed level of jobs where removing some from work frees up other employment.

However, while it is true at the macro level of the economy that there are not a finite number of jobs, nonetheless, individual workplaces, such as the law firm in *Seldon*, can offer a relatively fixed number of jobs.⁵⁶ It is possible in these circumstances that a retirement age can free up opportunities for promotion and hiring. Therefore, a retirement age can further the aim of inter-generational fairness.

In assessing the justifiability of the retirement age in *Seldon*, it is essential to determine whether the retirement age promotes social equality and equality of opportunity, to the extent

⁵⁵ See ONS, Labour Market Statistical Releases.

⁵⁶ Fredman, S 'The Age of Equality' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing 2003).

that justifies the seriousness of the interference with the claimant's interest in being free from the burden of the retirement age. Further to this, we can consider the principles that explain the harms of discrimination, including social equality, equality of opportunity, autonomy and respect. Importantly, while retirement ages can promote equality of opportunity and social equality by granting work opportunities to younger people and under-represented groups, retirement ages can hinder the capacity of older workers to participate in the workforce as equals to other age groups, and therefore retirement ages can undermine social equality for older people. Further, retirement ages can violate autonomy when the policy is unilaterally imposed on workers.

However, the courts and tribunals could quite appropriately come to the decision that the retirement age was proportionate and lawful in *Seldon*. The claimant in *Seldon* had an equal bargaining power and at the time of signing the partnership agreement did not question the retirement age contained in the agreement. This mitigated some of the deleterious effects of the retirement age by respecting the autonomy of the claimant. In upholding the principle of autonomy, it was reasonable for the ET and EAT to find that the retirement age reflected the agreed mutual interests of the partners and younger workers. Furthermore, the claimant's consent to the retirement age also mitigated the harm to social equality since the claimant was able to negotiate his employment terms as an equal in his role as a partner. This also meant that the retirement age policy was consistent with the respect principle by not unilaterally imposing a retirement age.

Lockwood v Department of Work and Pensions & Anor

This case concerned a policy of lower redundancy pay for younger workers. The claimant began working at the Department for Work and Pensions ('DWP') at 18 years of age. She continued working at the DWP for eight years until she was 26 years old. The claimant then

applied for redundancy and was accepted. The redundancy scheme entitled her to £10,849.04. However, the same scheme would have entitled her to significantly more money if she were over 30 years of age and had worked the same number of years at the DWP. The claimant argued this was direct age discrimination because it treated her less favourably because she was a young employee.

The ET held that there were differences between the different age groups that meant that those below the age of 30 were not treated less favourably than those above the age of 30.⁵⁷ The ET held that even if they were wrong about this, the treatment was a proportionate means of achieving a legitimate aim. The ET relied on the assumption that older people need more redundancy pay because they are more likely to have families than young people and this meant that they have greater financial obligations and have a harder time traveling to find work. It was a legitimate aim, the ET and the EAT upheld, to financially cushion older workers who are in a more vulnerable position than younger workers.⁵⁸

The ET also held that the measure was proportionate because the redundancy scheme was reasonably necessary to the aim of offering a financial cushion, and this legitimate aim outweighed the discriminatory effects of the scheme. The means were reasonably necessary because administrative workability required the use of clear bands so that everybody knew the pay they were entitled to. Levelling up younger workers' pay would achieve equality but would be expensive. And levelling down older workers' pay to match younger workers would not adequately provide a financial cushion for older workers.

The EAT upheld the ET's decision and the claimant appealed to the Court of Appeal.⁵⁹ The Court of Appeal held that the redundancy scheme engaged the direct age discrimination

⁵⁷ [2011] ET/1808694/07, 101539/08, 115515/10.

⁵⁸ [2013] UKEAT 0094/12/0402.

⁵⁹ [2013] EWCA Civ 1195, [2014] 1 All ER 250.

provisions. The claimant's comparator was an employee over 35 who had worked for the DWP for the same amount of time as the claimant. The comparator would receive at least twice what the claimant received and it followed that the claimant was treated less favourably and was so treated because of her age. However, the Court of Appeal found that the DWP had adopted a proportionate means to achieve the legitimate aim of producing a financial cushion for older workers.

Commentary

In *Lockwood*, the redundancy policy assumed that young people are less likely to be encumbered than older people because they are less likely to have dependants or to be married, and therefore, on average, will find it easier to obtain employment in a shorter amount of time than older people. People in their 30s will need more redundancy pay to cover what may be a longer period of unemployment or underemployment.

Is this a legitimate aim? The academic literature has cast doubt on the assumption that young people find it easier to obtain employment than older people, particularly because the evidence demonstrates that young people have a much higher unemployment rate than older workers.⁶⁰ In addition, the aim of financially cushioning older workers may violate the respect principle by offering lower concern and respect for younger age groups. As established in the previous section of this article, age-differential treatment can inflict harms that are analogous to the harms of paradigm forms of discrimination, including prejudice and stereotyping that communicates that particular groups have a diminished social and moral worth. I have explained that even 'accurate' generalisations can be disrespectful because they can reinforce stereotypes that imply that particular groups have a lower moral and social worth. It follows

⁶⁰ Blackham, A 'Falling on Their Feet: Young Workers, Employment and Age Discrimination' (2015) 44.2 *Industrial Law Journal* 246 at 254

that even if the generalisation in *Lockwood* that young people are more 'flexible' in finding work is an accurate categorisation, this treatment can still be wrong if it reinforces disrespectful ideas about young people. Is this harm present in the redundancy policy in *Lockwood*?

The redundancy policy does not necessarily represent animus or dislike for younger groups. However, the aim of the policy to cushion older workers in a period of unemployment relies on stereotypes about young people, namely, it reflects a generalisation that young people will react differently to unemployment when compared to older people. The ET reasoned that '[i]ndividuals in the younger categories and in their twenties can generally be expected to react more easily and more rapidly to the loss of their jobs and greater flexibility can, in general, be expected of them given their lesser family and financial obligations'.⁶¹ The ET referred to 'the average date of marriage was 34 for women, and 38 years for men' as an explanation for why greater financial assistance was needed for people in their 30s compared to people in their 20s. This assumes that young people have an easier time finding employment and do not face the difficulties that older people face.

While this is not a stereotype that amounts to straightforward prejudice against young people, the stereotype does ignore people's individual circumstances and, as a result, can be unfair to young people who do face significant disadvantages in finding employment. People under 30 years of age are less likely to be married with children but many people of this age have family and financial obligations comparable to or exceeding that of older work colleagues. Although younger, they may have dependent parents, disabled siblings, cousins etc as well as children, any of whom they may be supporting financially. They may face the difficulty of upending their family life by moving locations to find employment.

⁶¹ [2011] ET/1808694/07, 101539/08, 115515/10 [27].

Also, as Blackham has argued, ‘[j]ust because young people do not have a mortgage or children does not mean that they lack onerous financial commitments or have less “need” for redundancy payments’.⁶² Young people may have as much difficulty paying rent in a period of unemployment as older people may face in paying a mortgage. By assuming that young people do not face the difficulties that people over 30 years of age face, the DWP were treating young people less favourably based on stereotypical assumptions about their private lives, and, in doing this, the impugned policy communicated that the interests of young people are of less concern and value. On this basis, the aim of financially cushioning older workers should not be capable of justifying the redundancy policy in *Lockwood*.

However, it is possible that the redundancy scheme could have been justified by an argument that it supports inter-generational fairness by creating employment opportunities for young people (which I have established as legitimate in the discussion of *Seldon* above). For example, the DWP could have argued that higher redundancy payments for older workers can encourage older workers to leave who might otherwise not have done so, which may create available space for more junior employees. This aim is legitimate because young people are often disadvantaged in the employment market because of lack of experience, and it is legitimate to give young people a chance to gain experience and develop their careers.

A relevant consideration in determining whether the scheme was necessary to achieve the aim of inter-generational fairness is to consider that the aim could not be achieved as effectively if redundancy pay was equal for younger and older workers. Paying older workers more than younger workers is necessary to incentivise a greater proportion of older workers to vacate their places to leave room for younger workers. The alternative method of equal pay will not achieve this aim so effectively.

⁶² Blackham (n 60) at 257.

However, the DWP did not introduce the inter-generational fairness aim of creating opportunities for young people, and we therefore are unable to assess the evidence of whether the scheme is likely to have the benefit of creating enough jobs for young people to justify its discriminatory effects on the claimant. Absent this evidence, the policy should be considered unjustified age discrimination.

*R v SS for Work and Pensions Ex p Carson and Reynolds*⁶³

The claimant was unemployed and in receipt of jobseekers and income support, which amounted to £41.35 per week. Had the claimant been over 25 years of age, they would have been entitled to £52.20 per week. She argued that this policy violated Article 14 of the ECHR because it was discriminatory on the grounds of age.

The House of Lords held that the policy engaged Article 14 and Article 8 of the ECHR, but held that the policy was justified on the grounds that younger people tend to earn less in work which means that a lower rate of jobseekers and income support reflects a lower proportion of income that younger people are likely to receive in work.⁶⁴ Further, young people tend to have lower expenses, the Court held, because they are more likely to share accommodation, including sharing accommodation with parents who may also offer financial support. The policy was also justified, the Court held, as a way to discourage young people living independently which may lead to greater use of scarce resources such as housing.⁶⁵ In finding this, Lord Rodger said:

⁶³ [2005] UKHL 37; [2006] 1 AC 173.

⁶⁴ *Ibid*, para 37-40, 45.

⁶⁵ *Ibid*.

... There is no doubt that the relevant Regulations, endorsed by Parliament deliberately gave less to those under 25. But that was not because the policy-makers were treating people under 25 years of age as less valuable members of society. Rather, having regard to a number of factors, they judged that the situation of those under 25, as a class, was different from that of people of 25 and over, as a class.... In my view ... it was open to ministers and Parliament, in the exercise of a broad political judgment, to differentiate between the two groups and to set different levels of benefit for them. Drawing the bright demarcation line at 25 was simply one part of that exercise⁶⁶

In finding this, the Court held that age-differential treatment is not a ‘suspect’ ground and therefore age generalisations are not degrading to particular social groups in the way that race or sex generalisations are. Since there was a rational basis for the age classification, the age-differential treatment was justified.

Commentary

Were the House of Lords right to assume that the policy was justified because it had a rational basis and was not disrespectful to younger age groups? To answer this, we can assess the justifications of the policy and examine whether the policy reveals any invidious assumptions about age groups. In finding the lower job seekers and income support policy justified, the House of Lords assumed that younger people can have lower housing costs while unemployed because they are more likely to share accommodation, particularly with their parents who may not charge their adult children rent. This assumption, however, was not evidenced, and it may be questioned that housing costs are lower for young people. Older people are more likely to

⁶⁶ Ibid, para 45.

share accommodation with a spouse which can lead to the contribution of a spouse's salary towards housing costs.

Further, the assumption that young people can move in with their parents to lower housing costs pays scant regard to individual circumstances of young people. Many young people's parents may have died and many are estranged from their parents. Young people in these circumstances may have needs exceeding that of older people while unemployed. It is also insulting for a policy to assume that these people deserve lower assistance on the grounds that they can expect to rely on their parents. Some people are forced to live independently from family because they may be at risk of abuse. In this way, the lower rates for people under 25 years of age unfairly punishes unemployed young people who must live independently.

Also, the aim of encouraging young people to live with parents communicates that young people should refrain from attempting to live fully independent lives. This reflects a negative stereotype that young people should not be considered fully capable adults. It also harms the autonomy principle by reducing people's capacity to develop independence during adulthood and undermines social equality by placing young people in a precarious financial position that can reduce their capacity to participate in society as equals with other age groups.

In summary, the policy reflects a disrespectful indifference to the interests of younger people by connecting unsupported generalisations about young people to low levels of social assistance thereby classifying young people as less entitled to the social assistance necessary to have sufficient means to live a dignified life.

If we are to accord sufficient weight to the seriousness of age discrimination as a moral problem, then the age-differential treatment in *Carson and Reynolds* should be deemed unjustified and therefore in breach of Article 14.

Conclusion

Much of the case law has failed to rigorously scrutinise the justifiability of impugned age-differential treatment, including failing to scrutinise the legitimacy of defendants' aims and failing to engage with the discriminatory impact of the treatment. In this way, the courts have treated age discrimination as a less serious ground of discrimination requiring a low level of scrutiny. However, this article has argued that age discrimination should not be considered a less serious form of discrimination. I have established that age discrimination can undermine the same principles that paradigm forms of discrimination also undermine, including: creating inequality of opportunity by disadvantaging people because of a trait that is outside a person's control; undermining social equality by creating a hierarchy of social status between different groups; violating autonomy by diminishing people's capacity to have control over their lives; and violating respect by communicating that particular groups have a diminished moral or social worth.

It follows that the courts should rigorously scrutinise age distinctions for violations of these principles and only permit age distinctions that are strictly tailored to enhance equality or other important values. For example, when evaluating the justifiability of a mandatory retirement age, the courts should identify that retirement ages can undermine social equality by removing older people from socially productive work and can violate autonomy by removing older people from work against their will. Further, the courts should reject aims that reflect negative stereotypes or prejudice against particular age groups. For example, it should not be possible to justify retirement ages on the grounds that this can avoid the possibility of capability assessments for older workers since this reflects the negative stereotype that older people are less capable.

This argument has implications for the legislation on age discrimination. It is problematic that the Framework Directive and the Equality Act 2010 has a general justification

test for direct unequal treatment on the grounds of age when the legislation only permits unequal treatment relating to other protected characteristics in much more restricted circumstances, such as when the treatment is a genuine occupational requirement or if the treatment fits in the positive action criteria. The legislation therefore creates a hierarchy of protected characteristics with age-differential treatment being more capable of legal justification than other grounds. This can encourage the perception that age discrimination is a less serious form of discrimination.

There are two possible responses to create legal parity between age and other protected characteristics under anti-discrimination law to recognise that age can be as serious a form of discrimination as other grounds. Firstly, the legislation can remove the general justification test for age distinctions to ensure there is equivalent exceptions to the prohibition of age-differential treatment as the prohibition of race or sex-differential treatment. The disadvantage of this approach, however, is that it may make it harder to justify age-differential treatment that genuinely aims to assist disadvantaged groups. This is because age-differential treatment would have to fit into a specific exception under this approach to be lawful, such as the positive action provisions under the Equality Act 2010, which permits differential treatment to favour disadvantage groups. This exception is highly restrictive in the context of recruitment and promotion and therefore can limit age-based distinctions that can enhance equality.⁶⁷

A better, but likely controversial, approach, would be to introduce a general justification test across the range of protected characteristics to permit direct unequal treatment that is proportionate to a legitimate aim.⁶⁸ This would ensure protected characteristics can be used to

⁶⁷ See Equality Act 2010, s 159.

⁶⁸ Many reject the idea that there should be a general justification test for direct discrimination. It is argued that direct discrimination is more of an affront to dignity than indirect discrimination and therefore the law should make it more difficult to justify direct discrimination than indirect discrimination. Providing a general justification test for direct discrimination, so this argument goes, would subject direct discrimination to the same legal procedure as indirect discrimination which currently has a general justification test. See Gill, T and Monaghan, K 'Justification in Direct Sex Discrimination Law: Taboo Upheld' (2003) 32.2 *Industrial Law Journal* 115

further equality or other important social and economic objectives in a way that is currently not possible due to the highly restrictive criteria for positive action measures. The approach would also ensure that the legislation would treat age discrimination as having an equivalent legal status as other protected characteristics.